

AK-CHIN INDIAN COMMUNITY

Community Government

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**TESTIMONY OF
CHAIRMAN DELIA CARLYLE
ON BEHALF OF THE
AK-CHIN INDIAN COMMUNITY
AND THE
ARIZONA INDIAN GAMING ASSOCIATION**

**BEFORE THE
SENATE COMMITTEE ON INDIAN AFFAIRS**

April 17, 2008

Introduction

Good Morning, Chairman Dorgan, Vice-Chair Murkowski, other distinguished members of this Committee and Staff.

My name is Delia Carlyle and I am the Chairman of the Ak-Chin Indian Community. I am also Chair of the Arizona Indian Gaming Association ("AIGA") which represents 19 tribes in Arizona. My comments today are on behalf of both my Tribe and AIGA.

The Ak-Chin Indian Community Reservation was established in May 1912 and comprised over 47,000 acres. A few months later, more than half of the Reservation was taken by the federal government and reduced to its present day size of almost 22,000 acres. The Community is located approximately 35 miles south of Phoenix, Arizona, near the Gila River Indian Reservation. We are a small tribe with about 800 enrolled members.

Ak-Chin is an O'odham word which means "people of the wash." The term refers to a type of desert farming that depends on the area's washes where our ancestral people planted beans, corn and squash, which were irrigated from the wash runoff from storms. While we are still farmers today, we also engage in another form of economic development known as Tribal Governmental Gaming which helps support the needs and dreams of our tribe and tribal members.

On behalf of the Ak-Chin Indian Community I would like to thank the Chairman, Vice- Chair, and the other members of this Committee for holding this hearing on oversight of the National Indian Gaming Commission ("NIGC").

Collaborative Regulation: Arizona Indian Tribes and the Arizona Department of Gaming

First, let me discuss what I think many of you may have heard about Arizona Indian gaming. In Arizona, the tribes and State have developed a collaborative partnership for effective regulation of Indian gaming. After years, if not decades, of the State not accepting that tribes are in fact sovereign governments, Arizona, under the leadership of Governor Napolitano, now understands that tribes are indeed sovereign governments that predate Arizona. Moreover, under the leadership of Executive Director Paul Bullis at the Arizona Department of Gaming, the relationship between tribes and the State has become a successful partnership. That is not to say we agree on everything. Like many good relationships, we often agree to disagree but remain reasonable, respectful and attentive.

In Arizona, the Tribal-State Gaming Compacts delineate the roles and responsibilities of the tribes and State. To reiterate what Director Bullis has previously stated to this Committee, "[a]lthough the Compact is the cornerstone of our partnership, what makes the partnership work is communication, discussion, engagement, and a process for resolving issues."¹

Pursuant to our Compacts, tribal gaming in Arizona funds the vast majority of the Arizona Department of Gaming's budget and regulatory activities. The Department's fiscal year 2008 budget is approximately \$15.6 million dollars, and for FY 2009 about \$16.3 million dollars. To highlight some examples, the tribally-funded Arizona Department of Gaming²:

- Has 111 employees (comprised of numerous peace officers, auditors, CPAs and CFEs);
- Performed approximately 12,000 slot machine inspection and certifications;
- Conducted over 300 vendor background reviews and certifications with 100 being new vendor certifications and 200 renewals; and
- Conducted approximately 10,000 employee background reviews and certifications with almost 2500 new applications and over 7500 renewals.

Please keep in mind that tribal regulatory agencies also inspect and certify slot machines; review and certify employee and vendor backgrounds; and have multimillion dollar budgets and staff to ensure fair and safe gaming on our tribal lands. In May 2007, "Casino Enterprise Management" magazine wrote that Arizona's regulatory program exemplifies "the very best in regulation." The magazine staff spent several days with the Arizona Department of Gaming and observed their gaming compliance technicians inspecting slot machines at our casinos. The article said: "The state regulators and the tribal regulators work together for the best interest of gaming and to assure compliant and effective enforcement. The Department's management and staff have worked hard to build a comprehensive and efficient system of checks and balances that not only work

¹ SCIA March 8, 2006 Testimony of Mr. Paul Bullis.

² Arizona Department of Gaming.

well for them, but...are also welcomed by the tribes." Consequently, tribal gaming activity in Arizona is rigorously regulated by both the tribes and the State.

NIGC Regulation

I want to touch upon several issues we have with NIGC current regulatory regime. In general, the NIGC is overreaching with its recent regulations, and appears to be engaged in empire building as there is no significant reason for them to be involving themselves in areas already regulated by other tribal, federal, and state agencies.

The NIGC's "one size fits all" regulatory approach does not work throughout Indian country. It does not take into account the different sizes of gaming facilities, varied locations, and tribal-state compacts, which may already address a particular issue. The NIGC's continued use of a shotgun approach to regulation does not address the actual, narrow issue that the NIGC may seek to resolve. Recently, the NIGC has frequently cast a wide net at a single issue, only to ensnare tribes and states that are already regulating the areas of NIGC concern. Consequently, the NIGC does not effectively and efficiently allocate resources where they are most needed.

A prime example is the duplication of regulatory resources for the review and licensing approval for gaming vendors and employees. In Arizona, we conduct thorough investigations to protect the public and ensure the integrity of gaming. As shown above, both the Arizona Department of Gaming and tribal regulatory agencies review background information which includes criminal and credit history, financial background, regulatory and other information, and certify practically every employee and vendor providing gaming services in excess of \$10,000 in any single month. In this area, there is duplication of regulation with the NIGC. To better allocate resources, the NIGC could assist tribes and states where there is not the same level of regulation as with tribes and states that already duplicate NIGC regulation.

Problems with NIGC Regulation - Facility Licensing Standards

The promulgation and publishing of the Facility Licensing Standards are prime examples of how the NIGC has disregarded *meaningful tribal consultation and collaboration*, and unilaterally adopts its own rules. The NIGC's own March 31, 2004 Tribal Consultation Policy requires that:

To the extent practicable and permitted by law, the NIGC will engage in regular, timely, and meaningful government-to-government consultation and collaboration with Federally-recognized Indian tribes, when formulating and implementing NIGC administrative regulations...which may substantially affect or impact the operation or regulation of gaming on Indian lands by tribes under the provisions of IGRA.

Accordingly, collaboration means more than the NIGC incorporating grammatical comments into their regulations. Based upon our experience with tribal and State regulation in Arizona, consultation and collaboration means actually listening to and considering tribal perspectives – not just sitting across from tribal representatives in a one hour meeting and responding with only a curt “thanks for your comments.” This regulation by fiat must be replaced by *meaningful* consultation and collaboration with tribes, instead of the all too familiar “we [NIGC] considered that comment but....”

Here is an example of what NIGC considers consultation. As stated in Chairman Hogan's testimony on H.R. 5608, “Gaming tribes have formed regional gaming associations, such as... Those organizations meet annually or more often, and NIGC has taken those opportunities to invite tribal leaders to attend consultation meetings on a NIGC-to-individual-tribe basis. Consulting at gaming association meetings maximizes the use of the Commission's time and minimizes the travel expenses that tribes, who ordinarily attend those meeting anyway, must expend for consultation.” While this looks great on the surface, the experience we had at our Annual Southwest Trade Show was very different. Although Arizona tribes received letters to meet with NIGC (see attached example letter), tribal leaders also extended an invitation to the NIGC to meet with them at a breakfast since some of the tribal leaders could not meet with the NIGC at their scheduled time (where the NIGC met with tribal staff). The first comment to the Commissioners was that they would like to talk about the “Facility Licensing Draft Regulations.” To our surprise, the answer from the NIGC was that the regulations were already at the Federal Register waiting to be published and additional comments were unnecessary. When asked if there were changes from the last draft – the answer was yes. When asked if they could let the leaders know what changes were made the answer was no.

If you look further into this issue you will see that the NIGC consultation letters to tribal leaders inviting them to a consultation meeting were dated December 12, 2007. One of the bullet point discussion items was the “[s]tatus of proposed facility licensing regulations.” Our tribal leaders' breakfast meeting was on January 15, 2008. The new regulations were published on February 1, 2008. It seems disingenuous that the NIGC listed for discussion with tribal leaders the proposed gaming facility licensing standards, when the NIGC already had its version of the standards at the Federal Register waiting to be published two weeks later.

A significant problem at the NIGC is that they have stopped listening to tribes. As I have previously stated, in Arizona, both the tribes and the Arizona Department of Gaming work together to fulfill the goals of the Compact by *listening* to each other to develop a mutual understanding, even if we don't always agree. The problem with the NIGC is that they are hearing tribes – but *not* listening! While this NIGC administration has done a good job of meeting with tribes as compared to their predecessors, they are putting *quantity* of meetings over *quality* of listening to tribes. For example, most tribes in Arizona met with the NIGC in March 2007 and January 2008 regarding the Facility Licensing Standards. Again, the quality of consultation is far more important than the quantity of tribal consultations.

In December of 2007, the AIGA submitted written comments to the NIGC which detailed AIGA's objections to their Facility Licensing Standards. In summary, the 19 Indian tribes of AIGA find it offensive that the NIGC's Standards conflict with the intent of IGRA, which recognizes tribal authority to regulate the construction, maintenance, and operation of a tribal gaming facility within tribal jurisdiction. In addition, the regulations provide a very broad grant of authority and discretion to only the Chairman, as opposed to the Commission, for approving gaming facility licenses. IGRA itself provides that a *tribe* must issue a facility license for Class II or III gaming. Finally, the tribe must provide in its tribal gaming ordinance that it will comply with appropriate construction, maintenance, and operation of these facilities.

Furthermore, our State-Tribal Compacts already require tribes to comply with minimum operational standards to protect environment, health and safety. Once again, the NIGC's rules conflict with our Compact and, thus, are a waste of resources when tribal operations in Arizona already comply with such standards.

The overbreadth of regulation is especially true for the new Gaming Facility Licensing Standards. The Indian Gaming Regulatory Act ("IGRA") is supposed to provide a balanced framework for tribal, state, and federal regulators. Unfortunately, the NIGC has upset that delicate balance with its new Gaming Facility Licensing Standards. With the new regulations, the NIGC is trying to expand from a *gaming activity* regulator to a sanitation, emergency preparedness, electrical, plumbing, food and water, construction and maintenance, hazardous materials, and environmental regulator. Mr. Chairman and other distinguished members of the Committee, we already have the EPA, OSHA, IHS, and other federal, state and tribal regulators who review environmental, and health and safety conditions. There are more than enough federal layers piled on our industry. Moreover, we are highly dubious of gaming regulators turned all-of-the-above regulators at the swoop of a federal register publication. We do not need yet another federal agency expanding beyond its statutory mission as directed by Congress to become another unwieldy, burgeoning bureaucracy.

Finally, another major concern of many tribal regulators is whether the NIGC is prepared to understand and apply new technology as it rolls out today and in the future. We are concerned that the NIGC's process for Class II gaming could once again delay available technology and future gaming activities for tribal gaming.

Revised GPRA

On October 1, 2007, the NIGC submitted its Draft Government Performance Results Act Report ("GPRA"). The GPRA Report was due pursuant to the Congressional mandate as part of S. 1295, the National Indian Gaming Commission Accountability Act of 2005. Subsequently, as I have been informed, the NIGC has decided on its own to revise its *own* draft, a draft that was approved by the Chairman of NIGC and submitted for comment to the Office of Budget and Management. The NIGC's decision to revise its GPRA Report stalls its mandated requirement to submit to Congress: (1) a strategic five-

year plan, annual performance plans, and performance reports, and (2) as part of its compliance with GPRA, a plan that addresses technical assistance to tribal gaming operations. If in fact the NIGC is not going to comply with the mandate, then it should be held responsible. The NIGC should not be allowed to stall this long, and Congress should not enable the delay. Without the GPRA Report, tribes have no idea how the current regulations fit into the NIGC's five-year plan and when, or if, the technical assistance that many tribes need are adequate or even being developed. Furthermore, we question the logic of embarking on such large regulatory changes without first knowing how they fit into a strategic plan and without that plan going out for consultation with the very people who have to implement it.

Conclusion

Again, on behalf of the Ak-Chin Indian Community I would like to thank the Chairman, Vice Chair, and the other members of this Committee for holding this very important hearing. Thank you.



December 12, 2007

Charles McCarty, Executive Director
Ak-Chin Gaming Commission
15406 N. Maricopa Rd.
Maricopa, AZ 85239

GOVERNMENT-TO-GOVERNMENT CONSULTATION NOTICE AND REQUEST

Dear Executive Director McCarty:

Pursuant to our commitment to government-to-government tribal consultation and in keeping with our stated policy, the National Indian Gaming Commission (NIGC) will be in Scottsdale, Arizona for the 11th Annual Southwestern Indian Gaming Conference and Expo on Tuesday, January 15th and Wednesday, January 16th, 2008, for the purpose of meeting and consulting separately with individual Tribes in Arizona and New Mexico.

Based on our separate government-to-government relationship with each Tribe and in recognition of the individual uniqueness of each Tribe, the Commission asks to meet and consult separately and privately with each individual Tribe and its governmental and regulatory gaming leaders. The Commission has reserved the Conference Room 103 in the Radisson Fort McDowell for this purpose. Meetings times may be scheduled on Tuesday, January 15th between 1:00 p.m. and 5:00 p.m. and Wednesday, January 16th between 9:00 a.m. and 5:00 p.m. Each meeting will be scheduled for 45 minutes. At these meetings, the Commission would like to hear and discuss your comments, questions, concerns and recommendations regarding:

- Training and technical assistance needs and the NIGC training catalog;
- Status of proposed facility licensing regulations and the proposed class II gaming regulations that include class II game classification standards, facsimile definition, class II technical standards and class II minimum internal control standards;
- Scope of NIGC's regulation of Class III gaming activities in light of Court holdings in *Colorado River Indian Tribes v. NIGC* litigation;

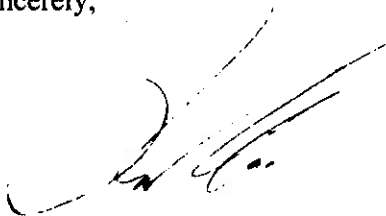
- Planning for NIGC's compliance with the Government Performance Results Act (GPRA), including budget review, training and technical assistance;
- Developing regulations that define sole propriety interest;
- Proposals for regulations to reduce the requirement to submit fees to twice a year from four times a year; to allow tribes to request a reduced scope audit in certain circumstances; to update and clarify the management contract regulations; and to revise the definition of net revenue; and
- Other gaming regulatory issues of concern of your Tribe.

Please complete and fax the enclosed meeting reservation form to Ms. Rita Homa at 202-632-0045 to schedule your Tribe's private government-to-government consultation meeting with the Commission, as soon as possible. Each meeting will be scheduled on a first come first served basis with preference given to Tribes traveling the greater distance.

If you have any questions regarding the scheduling or consultation process, please call me or Ms. Homa at 202-418-9807.

Commissioner DesRosiers and I look forward to meeting and consulting with Tribes and their leaders during our visit to the Southwestern Indian Gaming Conference and hope you are able to schedule a meeting with us.

Sincerely,

A handwritten signature in black ink, appearing to read "Philip N. Hogen", with a stylized flourish at the end.

Philip N. Hogen
Chairman

Enclosure